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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1967

No. 664

GEORGE LESTER BALL, *et al.*,

*Petitioners,*

v.

EASTERN COAL CORPORATION, *et al.*,

*Respondents.*

**On Petition for Writ of Certiorari to the Court of Appeals of Kentucky**

**BRIEF OF RESPONDENTS UNITED MINE WORKERS OF AMERICA AND OF RESPONDENTS C. E. BEANE, MATT COMBS AND JOE DAVIS IN OPPOSITION**

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## OPINIONS BELOW

*Contrary to Petitioners' statement that "Petition for rehearing was denied on June 30, 1967" (Pet. 1), the certified transcript by the Clerk of the Court of Appeals of Kentucky, now on file in the Clerk's office of this Court, recites that the petition for rehearing was overruled on "6/27/67".*

Petitioners[1] accurately note that on March 24, 1967, the Court of Appeals of Kentucky announced its decision and rendered its opinion. The opinion appears in Peti-

[1]The terms "Petitioners" and "plaintiffs" are used interchangeably herein.

tioners' Petition for Writ of Certiorari as Appendix "H.", at pages 50-62.

## JURISDICTION

The jurisdictional requisites are adequately set forth in the petition.

## STATUTES INVOLVED

Though the complaint instituted in the state trial court did not mention any statute, the Court of Appeals' opinion recites (Pet. 55) that "This action, though brought in a state court, comes within the ambit of §301(a) of the Labor Management Relations Act of 1947, 29 USCA §185(a), and is controlled by federal law." Also pertinent is 29 USCA 173(d). The statutes' wording appears in Appendix A to this brief.

## COUNTERSTATEMENT OF QUESTIONS PRESENTED

Respondents[2] herein do not accept the statement of Questions Presented, as set forth in the Petition (p. 2).

In lieu thereof, Respondents submit the following:

1. Should the certiorari petition be rejected because of late filing?

2. Did the Court of Appeals of Kentucky, under the stipulated facts and applicable law, correctly affirm the trial court's judgment that UMW, as the collective bargaining agent, did not violate its duty of fair representation in resolving a seniority dispute between employees, members of UMW, and in bargaining collectively with the employer thereon, where there was no proof of union hostile discrimination, dishonesty or bad faith?

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[2]As used herein, the term "Respondents" includes UMW and the three individuals Beane, Combs and Davis. *Although no allegations in the original or amended complaint charge participation by either of the three individuals in any conduct alleged by plaintiffs to be wrongful,* nonetheless the amended complaint asserted that they are necessary and indispensable parties (R. 24).

## COUNTERSTATEMENT OF THE CASE

### 1. THE COMPLAINTS' ALLEGATIONS AND THE LOWER COURTS' JUDGMENTS.

On May 17, 1953, mine workings between Eastern Coal Corporation's[3] No. 8 Mine and No. 7 Mine were physically connected. Employees at each of the mines were members of United Mine Workers of America. Thereafter, when Eastern reduced its work forces, a dispute arose as to the proper date for establishing seniority in the connected mine, resulting in Petitioners' (plaintiffs) loss of employment.

Plaintiffs, who were employees at Eastern's Mines 4 and 8 and UMW members in good standing, instituted the instant action in the Pike Circuit Court (Kentucky) to recover $885,000.00, based upon Eastern's alleged breach of seniority provisions under the National Bituminous Coal Wage Agreement of 1950, as amended September 29, 1952, effective October 1, 1952[4]

The original complaint named Eastern and UMW as defendants (R. 4). An amended complaint (R. 24-30) added as defendants "C. E. Beane, Matt Combs and Joe Davis, Officers and Members of the United Mine Workers of America". Plaintiffs alleged, as to Eastern, that although the 1952 Agreement's seniority provisions provided that "In all cases where the working force is to be reduced, employees in each job classification at a mine with least service, shall be laid off first", on March 31, 1954, Eastern reduced its working forces at the mines and laid off plaintiffs but replaced them in their re-

[3]Eastern Coal Corporation herein is called "Eastern"; United Mine Workers of America herein is called "UMW".

[4]The complaint (R. 7) and amended complaint (R. 30) alleged that "each of these plaintiffs" have been damaged in excess of $5,000.00, and plaintiffs demand judgment of $885,000.00 and costs (R. 7, 30). Pagination references are to the transcript of the record certified by the Clerk of the Court of Appeals of Kentucky and filed in this Court's Clerk's office by Petitioners. *Unless otherwise indicated, all emphases are supplied.*

spective job classifications with employees having less service, thereby breaching its contract.

As to UMW, plaintiffs alleged that UMW owed them a fiduciary obligation to assist them in the protection of their contractual rights but, in violation of such obligation, UMW "wrongfully acquiesced, encouraged and actively encouraged" the contract's violation and "wrongfully conspired" with Eastern in violation of the contract to plaintiffs' injury and prejudice to the end that plaintiffs would be laid off and replaced as aforesaid in Eastern's Mines 4 and 8 (R. 4-7). Additionally, plaintiffs alleged that UMW conspired with local union officers in violation of its fiduciary obligation aforesaid; that plaintiffs requested the "Mine Committee" of Local Union No. 5737 to file charges in accord with the 1952 Agreement; that upon the Committee's arbitrary, capricious and unlawful refusal so to do, an appeal was made to "the Officials of District 17"[5] and to UMW's International Executive Board, both of which ruled arbitrarily and capriciously that "seniority could be transferred under the terms and provisions of an alleged local agreement" (R. 26-29).

The Pike Circuit Court's judgment of October 9, 1965 sustained the respective dismissal motions and motions for summary judgment as to Eastern, UMW and C. E. Beane, Matt Combs and Joe Davis, entered judgment in favor of each of them and dismissed plaintiffs' action (R. 97-98). Upon plaintiffs' appeal to the Court of Appeals of Kentucky, that Court affirmed the trial court's judgment.

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[5]Reference to "District 17" obviously refers to District 17, United Mine Workers of America.

**2. THE "STIPULATION OF FACTS" AND "FURTHER STIPULATION OF FACTS".**

The trial court directed the parties to submit proposed statements of facts. Though they were "very close to agreement on the contents of an Agreed Statement of Facts" (R. 38), this was not accomplished and the trial court then ordered a hearing at which such proposed statements were discussed at length and considered by the parties in the trial court's presence (R. 58). Thereafter, plaintiffs and defendants agreed to certain facts which were reduced to writing as *stipulated facts* and became a part of the record herein by court order (R. 58).

The "Stipulation of Facts" (R. 59) and "Further Stipulation of Facts" (R. 70), establish that:

Eastern was signatory to the 1952 Agreement negotiated with UMW, which provided *inter alia* as part of the agreement's seniority provisions that "where the working force is to be reduced, employees in each job classification at a mine with the least service, shall be laid off first" (R. 60). Under a heading "Settlement of Local and District Disputes", the agreement also provided a grievance machinery and that "Should differences arise between the Mine Workers and the Operators as to the meaning and application of the provisions of this Agreement, or should differences arise about matters not specifically mentioned in this Agreement", earnest effort to settle such differences should be made (1) between the aggrieved party and mine management; (2) through management and the Mine Committee; (3) through UMW District Representatives and a company commissioner representative (where employed); (4) by a board consisting of four members, two to be designated by the Mine Workers and two by management; and (5)

arbitration (R. 61-62). Grievances under the seniority arrangements were to be handled under grievance procedures (R. 60-61).

Eastern conducted its mining operations at Stone, Pike County, Kentucky. Eastern, as had its predecessors, gave to its mines, as they were opened, separate numerical designations (R. 63). Like its predecessors, Eastern has opened, closed and changed the numerically designated mines from time to time as circumstances and conditions dictated (R. 63).

**Mines Nos. 7, 7½ and 9**

Among its mines, Eastern had mines designated as Mines 7, 7½ and 9, and employees at these mines belonged to UMW Local No. 5729 (R. 63-64). Coal produced at these mines was loaded at the No. 7 tipple. Mine 9, opened in 1950, was closed May 15, 1953 (R. 63-64).

**Mines Nos. 8, 3 and 4**

Production from Eastern's Mine No. 8[6] (which connected underground with Mine No. 3) was loaded, with Mine No. 3's production, at the No. 3 tipple (R. 63). Employees there were members of UMW Local No. 5737. When No. 3 tipple burned in June, 1942, Eastern reactivated the old No. 8 tipple and thereupon production from both Mines 3 and 8 were loaded over the No. 8 tipple (R. 63). Likewise production from Mine No. 4 was loaded over the No. 8 tipple, and employees at Mine No. 4 (like those at Mines 3 and 8) were members of Local No. 5737 (R. 63).

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[6]Mine No. 8 had been closed by Fordson in 1932 and reopened by Eastern in 1938 (R. 63).

**Mines 7 and 8 Are Connected; Tipple No. 7 Is Abandoned**

In September, 1952, a new preparation plant was completed at the No. 8 tipple (R. 64). The plan was to bring all coal mined at Mines Nos. 7 and 7½ through the inside workings of Mine No. 8 and handle it, together with productions from Mines Nos. 3, 4 and 8, over the No. 8 preparation plant and tipple, thereby eliminating the No. 7 tipple (R. 64).

On May 17, 1953, the mine workings between Mine No. 8 and Mine No. 7 were cut together, establishing the first physical connection between those two mines (R. 64, 95). Thereafter, coal *from what had been No. 7 and* 7½ was hauled underground to and loaded over the No. 8 tipple (R. 64). The No. 7 tipple was abandoned and No. 7 portal was thereafter used only as ready access for men and supplies (R. 64).

At that time, specifically at May 17, 1953, there were 482 men employed at Mines Nos. 7 and 7½ and 501 men at Mines Nos. 3, 4 and 8 (R. 64).

**UMW Withdraws One Local's Charter**

Officers of both Local No. 5729 and 5737 requested that the two locals be merged on the basis that the two operations had become one mine; and, and in conformity with the settlement of disputes clause in the 1952 Agreement, one mine was recognized and agreed to by both parties. (See Petitioners' brief, pp. 32-33. 34, Appendix E, filed in the Kentucky Court of Appeals).

UMW's Constitution, Article XIV, Section 3, provides that "No mine shall be under the jurisdiction of more than one Local Union" (R. 64). By telegram received at the mine on June 16, 1953, Local Union No. 5729 (to which belonged employees at Mines 7, 7½ and 9) and

Local Union No. 5737 (to which employees at Mines 8, 3 and 4 belonged) were advised by officials of District 17, UMW, that Local No. 5729's charter had been withdrawn and its membership consolidated with that of Local No. 5737 (R. 64). District 17's Secretary-Treasurer advised Eastern that, under instructions from UMW's International officers, jurisdiction over Eastern's employees who are UMW members is "transferred from Local 5729 to Local Union 5737" (R. 65). District 17's Executive Board, by letter, notified Local 5737's Recording Secretary that on May 17, 1953, Mine No. 7 was connected by a haulway with Mine No. 8, resulting in No. 7 tipple being abandoned and all coal from *the consolidated mine* began going out over the No. 8 tipple" and that the two locals *"were consolidated* into one local" because "one mine could not be under the jurisdiction of two local unions" (R. 65).

**Transfer of Employees Prior to May 17, 1953**

Long before the underground haul was cut, and especially prior to June, 1953, plaintiffs worked in the Nos. 4 and 8 mines (R. 71). *Prior to May 17, 1953,* some employees at Mines Nos. 7, 7½ and 9 transferred to Mines Nos. 8, 3 and 4, and were recognized as "new men", and their seniority rights under the wage agreement were considered to have commenced when they transferred (R. 66).

**Transfer of Employees After May 17, 1953; the Lay-off; the Dispute; and the Union's Decision**

Between May 17 and June 16, 1953, some 33 men transferred from Mines 7 and 7½ to Mines 3, 4 and 8 (R. 66).

On June 26, 1953, a few men were laid off; and Eastern considered with the Local Mine Committee just how the

list should be prepared (R. 66, 95). Again, on October 26, 1953, another reduction in the working force occurred and again Eastern prepared its list (R. 66, 95). Dissatisfaction of some of the affected employees resulted in an appeal to District 17 (R. 66).

The question raised was whether seniority of the men transferred from No. 7 mine to No. 8 mine became effective on June 16 (date of consolidation of the two locals) so as to constitute them *new* men in No. 8 mine, or whether seniority became effective on May 17 (when the two mines were connected) in which event they carried their mine seniority with them. Plaintiffs contended that (1) all of Mine 7 employees who became members of Local 5737 by reason of the consolidation should be considered new men and their seniority should begin on May 17, 1953, when the two mines connected, and (2) under the 1952 Agreement plaintiffs had "more seniority at the mine" than those who became Local 5737 members when the two locals were consolidated (June 16, 1953) and therefore it was wrong to lay them off (R. 68-69).

District 17's then Vice President and its then Chief Field Representative held that May 17 (when the two mines were united) was the day when seniority should be determined (R. 66, 95). This decision, dated November 2, 1953, resulted in the Local Mine Committee's taking the matter up with Eastern as a matter to be negotiated further under the Agreement, and Eastern agreed with the Local Mine Committee and adjusted its payroll on November 9, 1953, to conform to the District 17 position (R. 66, 95-96).

Twenty-four of those cut off on October 26 and reinstated as of November 9, 1953, engaged an attorney to

assert claims against Eastern for loss of earnings while off (R. 66-67). These were rejected, as were charges filed against Eastern and UMW with the National Labor Relations Board, the Board's regional director refusing to issue a complaint (R. 67), and thereafter, upon appeal the Board's General Counsel and its Appeals Office "sustained the Regional Director's finding that the conduct engaged in was not violative of the" Labor Management Relations Act, 1947 (R. 72).

Other plaintiffs were cut off or furloughed in a working force reduction on December 1, 1953, and in March and April, 1954, respectively, the lists for both being prepared in accordance with the November 2, 1953 decision (R. 67).

Upon employee request, District 17's Executive Board again considered the question and in May, 1955, in substance affirmed the November 2, 1953, ruling (R. 67, 96). Similarly, an appeal to UMW resulted in the appointment of an International Commission, composed of two members of UMW's Executive Board, and the Commission on November 16, 1955, recommended that the November 2, 1953, opinion of District 17's Executive Board, affirmed by it on May 15, 1955, be sustained (R. 67-69, 96).

On May 16, 1956, UMW's International Executive Board in Washington, D. C., heard a committee representing the aggrieved employees on their appeal from the Commission's report and recommendation (R. 69). On May 17, 1956, the International Executive Board approved and affirmed the Commission's recommendation (R. 69, 96).

Eastern took no part in any of the proceedings within UMW (R. 69).

### 3. THE MOTIONS FOR SUMMARY JUDGMENT; THE TRIAL COURT'S FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT.

Respondents moved to convert their respective motions to dismiss upon the ground that the complaint failed to state a claim upon which relief can be granted into a motion for summary judgment (R. 94). Likewise, Eastern moved for summary judgment (R. 94). The court's findings of fact included findings based upon the stipulation of facts and further stipulation of facts (*ante*, pp. 5-10) that UMW had authority to approve the consolidation of Eastern's Mines 7 and 7½ with its Mines 3, 4 and 8 into a single producing unit, to withdraw the charter previously issued to Local No. 5729 and give to Local No. 5737 jurisdiction over the entire consolidated mine, to determine the effective date of such consolidation, and to permit among Union members the "dovetailing" of seniority rights for all members under the jurisdiction of the consolidated local as of the effective date thereof; and that the action taken by UMW in resolving the seniority questions made by District 17's Executive Board, by a commission of UMW, and by UMW's International Executive Board was not an arbitrary or unreasonable exercise of the authority vested in the Union (R. 96). It also found that, the questions being within the Union's authority and province to resolve, Eastern properly abstained from participating in or interfering with the Union's consideration and resolution of the questions, and that Eastern's decision to accommodate itself to the Union's position was reached in the process of continuing collective bargaining and could not, and did not, place Eastern in violation of the bargaining agreement (R. 96-97).

As conclusions of law, the Trial court held (R. 97-98)

there was no breach of fiduciary duty by Respondents; that Eastern did not violate its contract with the Union or any contractual obligation to plaintiffs; that no genuine issue as to any material fact existed; that by reason thereof Eastern is entitled to judgment as a matter of law; and that by reason of the foregoing and under principles enunciated in *Humphrey* v. *Moore*, 375 U.S. 335, Respondents are entitled to judgment as a matter of law. In its judgment, the trial court sustained each of the respective motions for summary judgment (R. 97-98); entered judgment in favor of Eastern, UMW and Beane, Combs and Davis, and dismissed the action as to each of them, noting plaintiff's objections and exceptions (R. 98).

#### 4. THE COURT OF APPEALS' JUDGMENT AND OPINION.

The Court of Appeals on March 24, 1967, affirmed the trial court's judgment. It noted, in its unanimous opinion, that the action, though brought in a state court, fell within the ambit of Section 301(a), Labor Management Relations Act, 1947 [29 USCA 185(a)], and is controlled by federal law, rejecting Petitioners' contention that a principal of state law enunciated in *Piercy* v. *Louisville & N. Ry. Co.*, 198 Ky. 477, 248 S.W. 1042 (1923) governed, and observing the principle "in our opinion is no longer the law" (Pet. 55).

It concluded that "dovetailing of the seniority lists for Nos. 4 and 8 and No. 7 was neither a violation nor an amendment of the contract", declaring that "When two mines become one they both lose their separate identities" (Pet. 60). Agreeing with the Union's decision, the appellate court observed that "if the question were before us on first impression, the union being denied any decision-making authority in the premises, that is

what this court also would decide. Hence it was not necessary to amend the contract" (Pet. 60).

Pointing to this Court's *Humphrey* v. *Moore*, 375 U.S. 335 (1964), *Aeronautical Lodge* v. *Campbell*, 337 U.S. 521 (1948), *Ford Motor Co.* v. *Huffman*, 345 U.S. 330 (1952), *the Court of Appeals noted there was neither fraud nor bad faith* (Pet. 61). It declared that "as bargaining representative for its members the union had the right and power to resolve this purely intra-union problem and, in the course of so doing, to effect an agreement with Eastern either interpreting or amending the contract accordingly" (Pet. 61). Surely, the appellate court declared, that "If a bargaining representative may alter seniority rights secured both by contract and by statute, as in *Ford Motor Co.* v. *Huffman*, 345 U.S. 330 . . . it must follow that it may do so when the rights are secured by contract only" (Pet. 61). Lastly, the Court of Appeals thought it "quite clear that the union did not in any sense fail in its duty of fair representation" (Pet. 61).

## ARGUMENT

### I. CERTIORARI SHOULD BE DENIED BECAUSE OF LATE FILING OF THE PETITION.

As shown herein, the record as certified by the Clerk of the Court of Appeals of Kentucky establishes that the petition for rehearing was overruled by that Court on *June 27, 1967*. Under 28 USCA 2101(c) and this Court's Rule 21 (prior to October 2, 1967), a petition for certiorari was required to be filed within ninety (90) days. Thus, such petition must have been filed no later than September 25, 1967. The instant petition was filed September 28, 1967. Since the time limitations are jurisdictional [*Federal Trade Commission* v. *Minneapolis-Honeywell Regulator Co.*, 344 U.S. 206; *Rust Land & Lumber*

*Co.* v. *Jackson*, 250 U.S. 71 (1919)], rejection and dismissal of the petition herein as not timely are appropriate.

**II. UNDER THE STIPULATED FACTS AND APPLICABLE LAW, THE COURT OF APPEALS CORRECTLY CONCLUDED THAT UMW, AS THE COLLECTIVE BARGAINING AGENT, DID NOT VIOLATE ITS DUTY OF FAIR REPRESENTATION IN RESOLVING A SENIORITY DISPUTE BETWEEN EMPLOYEES, MEMBERS OF UMW, AND IN BARGAINING COLLECTIVELY WITH THE EMPLOYER THEREON, WHERE THERE WAS NO PROOF OF UNION HOSTILE DISCRIMINATION, DISHONESTY OR BAD FAITH.**

**1. Union Activity in Resolving the Seniority Dispute And in Bargaining With Eastern Concerning It Constituted Good Faith Bargaining. The Court of Appeals, Affirming the Trial Court, Appropriately Concluded That UMW Did Not Breach Its Fiduciary Obligations Toward Petitioners.**

While a labor union's authority as exclusive bargaining agent in the negotiation and administration of a collective bargaining contract is accompanied by a duty of fair representation, liability for breach of that duty is imposed only when there is invidious discrimination, dishonesty or bad faith. *Conley* v. *Gibson*, 355 U.S. 41, 42 (1957); *Humphrey*, 375 U.S. 335, 349; *Vaca* v. *Sipes*, 17 L. ed. 2d 842, 859 (1967).

The trial court concluded "There was no breach of fiduciary duty" by Respondents to Petitioners (R. 97) and the Court of Appeals, declaring there was neither fraud nor bad faith, agreed "the union did not in any sense fail in its duty of fair representation" (Pet. 60-61).

The stipulated facts reveal that mine workings between the two mines or groups of mines were joined on May 17, 1953. This was a situation the 1952 Agreement did not specifically cover. But, "the collective bargaining authority is . . . not limited to the negotiations which . . . precede the making of new or successive contracts" but includes "the exceptional as well as the rou-

tine . . . working conditions". *Union News Co.* v. *Hildreth*, 6 Cir., 295 F. 2d 658, 664; *Order of Railroad Telegraphers* v. *Railway Express Agency, Inc.*, 321 U.S. 342, 346. This Court has recognized that there are "too many unforseeable contingencies" to make the words of a collective bargaining contract the exclusive source of rights and duties; and the bargaining process is a continuous one and includes administering the collective agreement (*United Steelworkers* v. *Warrior & Gulf Nav. Co.*, 363 U.S. 574, 579, 581), and the process is designed to be applicable to day-to-day problems (*Ostrofsky* v. *United Steelworkers*, DC, Md., 1959, 171 F. Supp. 782, 793, aff'd. 4 Cir., 273 F. 2d 614).

Consolidation of the two mines or groups of mines into a single mine, as both Kentucky courts found, and Eastern's reduction of working forces posed the problem of seniority among the employees competing for the same jobs. The 1952 Agreement, upon which Petitioners premise their seniority rights, was executed for the benefit of *all of the union's members employed at the two mining operations*, and *not for Petitioners' benefit alone*. When, by reason of changed operational situations, it became apparent the interests of employees at the two operations were involved by the changed circumstances, the union was again confronted with protecting the *collective* interests.

Whatever duty of fair representation UMW owed to Petitioners, it owed the same duty to all others in the competing groups. This Court's requirement that a labor union represent *all* employees without discrimination, announced in *Humphrey*, in *Steele* v. *L. & N. R.R. Co.*, 323 U.S. 192, and in *Ford Motor*, was reiterated in *Vaca* v. *Sipes*, 17 L. ed. 2d 850, where it is said: "... the exclusive

agent's statutory authority . . . includes a statutory obligation to serve the interests of *all* members without hostility or discrimination toward any, to exercise its discretion with complete good faith and honesty, and to avoid arbitrary conduct."

This is exactly what UMW did. When joinder of the two mines or groups of mines occurred on May 17, 1953, "Local Union 5729 and Local Union 5737 were merged at the request of the officers and committees of both Local Unions on the basis that it had become one mine"[7] and this accorded with UMW's constitutional mandate that "no mine shall be under the jurisdiction of more than one Local Union".[8] *Humphrey's* (375 U.S. 349) reminder that "Conflict between employees represented by the same union is a recurring fact", mirrored precisely the dilemma in which UMW found itself.

To adopt Petitioners' thesis that No. 7 employees should be regarded as *"new men"* would have deprived those employees of their total seniority rights; and of this the union had to be mindful if it was to serve, in honesty and good faith, employees in both Mines No. 7 and No. 8. With joinder of the two mining operations, it would have been equally arguable that No. 8 employees should be regarded as "new men" in the newly combined operation. The Court of Appeals aptly observed, "Appellants would have it that only No. 7 lost its identity. It could be just as well argued the other way around. That the tipple is located at No. 8 does not alter the fact that Nos. 4, 8 and 7, being joined together in one operating unit, are

[7]See Appendix E in Petitioners' Brief filed in the Court of Appeals of Kentucky, pp. 32, 34.

[8]Petitioners would evade this provision by arguing (Pet. 38) there is no prohibition of more than one mine being under a local union's jurisdiction—an assumed premise which is challenged by findings of both the trial and appellate courts.

now one mine" (Pet. 60). The stipulated facts abundantly show a rational basis for selection of May 17, 1953 as the effective date for determining seniority: that was the date when Eastern's two mining operations were connected as one mine. Thereby each employee came to the new and combined operation with such seniority as he had accumulated at his respective mine. It was an equitable solution of conflicting employee claims for seniority rights. It fell within the *"wide range of reasonableness"* accorded UMW as a labor union as bargaining representative. *Ford,* 345 U.S. 338.

**Petitioners' Seniority Rights Were not Immutable**

Petitioners' complaint (Pet. 35) there was no "authority to waive or disregard the rights secured unto each of them under the terms of a then existing contract" overlooks that, whatever protection against discharge they had, inured to them as a consequence of collective action of their union. It collides with applicable authorities which reject Petitioners' position that seniority rights obtained in collective bargaining are immutable.

In a concurrence in *Humphrey,* Mr. Justice Goldberg, pointing to *Ford,* noted that therein (375 U.S. 354-55)

> "There was no doubt that Huffman and members of his class were injured as a result of the 'supplementary agreement'; they were subjected to layoffs that would not have affected them if the seniority rankings had not been altered",

yet

> "Despite the change in rights under the prior agreement, this Court held that the existing labor agreement did not limit the power of the parties jointly, in the process of bargaining collectively, to make new and different contractual arrangements affecting seniority rights."

Long prior to this Court's *Humphrey* v. *Moore*, the Kentucky Court of Appeals held that if a union had authority to enter into a binding contract which provided seniority rights, it had a right to amend. *Day* v. *L & N R. Co.*, 295 Ky. 679, 175 S.W. 2d 347 (1943). Applying Kentucky Law, a federal district court pointed out that *Day* "denied a plaintiff the right to enforce against his employer seniority rights accruing under a collective bargaining agreement where his duly authorized collective representative negotiated a contract providing for less seniority for the plaintiff, in effect cutting off previous preferences he had enjoyed." *Napier* v. *System Federation No. 91, etc.*, DC, W.D. Ky., 1955, 127 F. Supp. 874, 890. Likewise, *Int. Longshoremen's Union* v. *Kuntz*, 9 Cir., 334 F. 2d 165, 171 (1964), declares that "where the power to bargain is not limited by contract . . . we believe that when 'vested rights' are impaired or extinguished in the course of the bargaining, any recourse by the person affected must then depend upon 'a bad faith motive, an intent to hostilely discriminate' on the part of the bargaining representative . . ." Other federal, as well as state court authority, are in accord.[9] *Hartley* v. *Bro. of Ry. etc. Clerks*, 283 Mich. 201, 206, 277 N.W. 885, recites that the union "had the power by agreement . . . to create the seniority rights of plaintiff(s) and it likewise, by the same method, had the power to modify or destroy these rights in the interest of all the members."

**The Court of Appeals Correctly Rejected Petitioners' Citation of Kentucky Cases**

Petitioners urge upon this Court (Pet. 20-24, Proposition 1) that under Kentucky law unions and their offi-

[9] *Oddie* v. *Ross Gear & Tool Co.*, 6 Cir., 305 F. 2d 143 (1962); *Wagner Mfg., Inc.* v. *Culbertson*, 206 N.E. 2d 378 (Ind., 1965); *Pratt* v. *Wilson Trucking Co.*, 214 Ga. 385, 104 S.E. 2d 915 (1958).

cers are agents of members to secure for the members as principals fair remuneration for their labor, but that they are not agents "for the purpose of adjusting the individual rights acquired by members in their contracts with employers, nor can the union... change or waive any personal rights of members" (Pet. 22), quoting from *Piercy* v. *Louisville & Nashville Ry. Co.*, 248 S.W. 1042 (Ky., 1923) and kindred cases (Pet. 22-24).

In addition to declaring that under *Humphrey* (375 U.S. 335, 343-44) *federal* law controlled the instant action (Pet. 55-56)[10], the Kentucky Court of Appeals (Pet. 55) declared the *Piercy* principle *"is no longer the law"*,

Petitioners do not challenge the Kentucky appellate court's avowal, and Respondents say properly so since, as noted, *Humphrey* made this proposition clear, and in *Day* (175 S.W. 2d 347) the Kentucky court distinguished *Piercy* and recognized that a labor union "has the right to amend" a labor contract; and in noting the distinction, *Napier* (127 F. Supp. 874, 891) states that *Piercy* "is no authority for denying the employer and the collective bargaining representative the right to modify seniority preferences of employees by undiscriminatory changes in the agreement as previously written."

Similarly, as already shown *(ante,* p. 18), *International Longshoreman's Union* v. *Kuntz*, 9 Cir., 334 F. 2d 165, 171, cited by Petitioners (Pet. 25) in support of their Proposition No. 2 that Eastern and UMW "bargained against the exercise of the use of discretion" does not so hold, but to the contrary, recognizes that "The settlement of a labor dispute, whether accomplished by amendment . . . or by resort to an already existing contract provision, may affect rights which in other fields are re-

[10] *Vaca* v. *Sipes*, 17 L. ed 2d 842, 848, reaffirms this principle.

garded as vested and in a manner would be deemed *'ex post facto'* ".

**The Court of Appeals Properly Applied The Principles Enunciated In Humphrey and Kindred Cases.**

Appropriately, the Court of Appeals implemented this Court's principle concerning the duty of fair representation as enunciated in *Humphrey, Aeronautical Lodge* and *Ford* and reaffirmed in *Vaca*. Though Petitioners assert that facts in the instant case differ from those in the cases discussed by the Court of Appeals, by reason whereof Petitioners contend that Court misapplied the principles (Pet. 32), the crucial fact remains that *not a single sentence in the entire petition is directed to a challenge of the conclusions of the trial court that Union action "was not an arbitrary or unreasonable exercise of the authority vested in the Union" (R. 96) or of the Court of Appeals' holding that UMW had not acted arbitrarily or in bad faith* (Pet. 61). *Moreover, not a single challenge is to be found in the petition to conclusions of the trial court (R. 97) or the Court of Appeals* (Pet. 61) *that UMW had not breached its duty toward Petitioners on the basis of arbitrariness, invidious discrimination, dishonesty or bad faith on UMW's part.*

Petitioners' complaint included a charge that the "Mine Committee", though requested, arbitrarily refused to present grievances on Petitioners' behalf, which denied them the right to have their dispute adjudicated under the grievance machinery as the 1952 Agreement provided. The Court of Appeals held "it was not necessary for the dispute to be resolved through the grievance process", and "Though such a procedure may be 'adequate' to the purpose, if the employer is willing to abide by the union's decision there is no practical reason for proceedings that require its further participation" (Pet. 61). In

this regard, the "Mine Committee" is not the agent of UMW under the bargaining agreement but, as characterized in *Garmeada Coal Co.* v. *Int. Union of UMWA*, DC, E.D., Ky., 1954, 122 F. Supp. 512, 515, aff'd. 6 Cir., 230 F.2d 945, is "appointed from the membership of the Local *to represent the employees in the settlement of grievances and disputes.*" Moreover, *Vaca* v. *Sipes*,, 17 L.ed 2d 842, rejects Petitioners' thesis by holding (p. 858) that individual employees do not have an absolute right to have grievances processed through the grievance machinery even where the underlying grievances are meritorious (p. 860). Pointing to 29 USCA 173(d), this Court noted that Congress declared "Final adjustment by a method agreed upon by the parties themselves is . . . the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective bargaining agreement." (p. 858).

Respondents submit that the Court of Appeals' approval and affirmance of the judgment in their favor is fully demonstrated by the foregoing discussion.

### III. PETITIONERS SEEK THIS COURT'S REVIEW OF EVIDENCE WHICH BOTH THE TRIAL COURT AND THE COURT OF APPEALS OF KENTUCKY HAVE HELD DID NOT SUPPORT THEIR CHARGES AGAINST UMW.

It is evident, in reviewing the certiorari petition, that Petitioners seek this Court's review not only of the evidence but of specific facts. This becomes abundantly clear by Petitioners' emphasis on its references to Eastern's reports to the Kentucky Department of Mines and Minerals during and after April, 1954 (Pet. 13-19, 29) though without regard to other undisputed and vital facts stipulated to by Petitioners which include, as Petitioners concede (Pet. 9), that Eastern connected its No. 7 and No. 8 mines in a project completed in May, 1953.

Though the Court of Appeals, like the trial court, adopted the positions of both Eastern and Respondents herein that Mines Nos. 4 and 8 and No. 7 lost their separate identities and that the dovetailing of the seniority lists neither violated nor amended the collective bargaining agreement (Pet. 60), Petitioners gear their entire certiorari petition on the assumption—and Respondents say an erroneous one—that Eastern "continued mining in Pike County, Kentucky, in its three (3) separate mines" (Pet. 13).

Ignoring all uncontroverted facts reflecting the intra-union dispute between the employees at the joined mines which confronted UMW as the bargaining representative and its good faith determination made in the interests of *all* employee members involved in the conflict over seniority, Petitioners point only to Eastern's reports to the Kentucky Department of Mines and Minerals (Pet. 13-19, 29) and assert that "the documented evidence clearly establishes that Eastern continued the operation of its No. 7 mine" (Pet. 30) as a predicate for this Court's review of findings and conclusions by both Kentucky courts which freed Respondents herein of Petitioners' charge that UMW breached its duty of fair representation. Petitioners' position clearly invites implementation of the rule that the Court does not "grant a certiorari to review evidence and discuss specific facts". *U.S.* v. *Johnson,* 268 U.S. 220, 227.

Of great pertinency, militating against the award of certiorari, is the fact that the evidence Petitioners ask this Court to review does *not* relate to the element of arbitrary or bad faith conduct, which this Court's *Humphrey, Vaca* and kindred cases plainly and firmly avow must be proved as a *sine qua non* to the imposition of liability for breach of the duty of fair representation. And, most tell-

ing that Petitioners are not entitled to review is the significant fact that Petitioners have not challenged UMW's exoneration of arbitrary conduct or bad faith accorded it by both the trial court and the Court of Appeals.

## CONCLUSION

In the twelve years since the events occurred, upon which Petitioners base their claims, every tribunal from which Petitioners have sought relief found no merit in Petitioners' contentions that UMW acted improperly. Petitioners waited for more than five years after UMW's Executive Board on May 17, *1956*, rejected their claims before instituting the instant action. As *United Construction Workers* v. *Haislip Baking Co.*, 4 Cir., 223 F.2d 872, 876, recited, "It is a most pertinent circumstance, *as bearing upon the bona fides of plaintiff's claim*, that action was not instituted until more than two years after the occurrences now relied upon as . . . giving rise to the damages claimed."

For the reasons herein discussed, Respondents submit that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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October, 1967